No. 82-2100

In the Supreme Court of the United States

OCTOBER TERM, 1983

ELIZABETH M. BEHREND, ET AL., PETITIONERS

v.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly held that the "sue and be sued" clauses of 12 U.S.C. 1702 and 1723a do not permit petitioners to pursue a constitutional tort claim against respondents, where any judgments would have to be paid from the Treasury.

2. Whether petitioners possess a constitutionally protected property interest requiring due process before GNMA may offer "tandem program" mortgages for sale only to FHA-approved mortgagees.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. la) is reported at 707 F.2d 1399 (table). The opinion of the district court (Pet. Supp. App. ls-8s) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1983. A petition for rehearing was denied on March 25, 1983 (Pet. App. 2a). The petition for a writ of certiorari was filed on June 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. 1702 provides in pertinent part:

> The Secretary [of Housing and Urban Development] shall, in carrying out the provisions of [12 U.S.C. 1702 to 1723h, 1731a to 1748h-3 and 1749aa to 1749aaa-5]

be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal.

12 U.S.C. 1723a(a) provides in pertinent part:

> [The Government National Mortgage Association] shall have power * * * in its corporate name, to sue and be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal, but no attachment, injunction, or other similar process, mesne or final, shall be issued against the property of the Association or against the Association with respect to its property * * *.

STATEMENT

1. The Government National Mortgage Association ("GNMA") provides special assistance for the financing of home mortgages.[1] This assistance is designed to make homes available for segments of the population that would otherwise be unable to obtain adequate housing. It also serves as a means of preventing declines in mortgage lending and home building activities. 12 U.S.C. 1716(b). In carrying out these tasks, GNMA is authorized to purchase and sell mortgages on residential housing. 12 U.S.C. 1717(b)(1). All the benefits and burdens incident to the administration of the functions and operations of GNMA inure solely to the Secretary of the Treasury. 12 U.S.C. 1722.

In performing these functions, GNMA is authorized to issue commitments to purchase and to purchase residential housing mortgages, including mortgages that are insured under the National Housing Act. 12 U.S.C. 1717(b)(1),

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[1]GNMA is a federal agency organized under the Department of Housing and Urban Development ("HUD"). 12 U.S.C. 1716(b), 1717(a)(2)(A).

1720(a). Under one group of mortgage purchase programs, the so-called "tandem" program, GNMA issues commitments to purchase from lenders mortgages reflecting loans at interest rates below the current market rate in order to subsidize the construction and maintenance of multi-family residential housing projects. The prices GNMA offers in its commitments to prospective mortgagees are more favorable than those that could be obtained from private investors. Thus, mortgage lenders are willing to originate below-market interest rate loans because GNMA's purchase commitments insure that the lenders will not be saddled with mortgages that return a smaller yield than could be obtained elsewhere.

After fulfilling its commitment to purchase the mortgages, GNMA attempts to sell them pursuant to its statutory authority. See 12 U.S.C. 1720(j). Generally the sales are conducted by auctioning groups of mortgages. All FHA-approved mortgagees are eligible to submit bids at such an auction. An FHA-approved mortgagee is one who has been found by the Secretary of HUD to be "responsible and able to service the mortgage properly." 12 U.S.C. 1709(b)(1). A mortgage not held by an approved mortgagee is not eligible for insurance under the FHA mortgage insurance program.

When GNMA sells the mortgages, it usually receives less than face value because of the below-market interest rates the loans bear. The difference between the favorable purchase price GNMA paid the lender and the lower price GNMA receives at auction reflects the amount of federal subsidy used to stimulate housing projects.

2. Petitioners are the developers and mortgagors of a 120-unit apartment project, financed under GNMA's tandem program. GNMA purchased the mortgage from the lender and was about to offer it for sale by auction, together with other tandem program mortgages. Since petitioners were not FHA-approved mortgagees, they were not eligible to submit bids at the auction.

Petitioners claim to have been injured by this restriction and filed suit against GNMA and the Secretary of HUD in the United States District Court for the Western District of Pennsylvania, seeking money damages, an injunction against the holding of the auction and declaratory relief. Although the allegations in their complaint were vague (see Pet. Supp. App. 3s), petitioners later explained to the district court (*id.* at 3s-4s) that their action was based on an alleged constitutional tort, similar to that claimed in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Respondents moved to dismiss the complaint on the ground that the claim was barred by sovereign immunity and that 12 U.S.C. 1702 and 1723a provided no basis for jurisdiction. These sections permit GNMA or the Secretary of HUD to be sued only if judgment against them could be satisfied out of a fund in their distinct and independent control. Since no such independent fund existed here, any sum awarded against GNMA or the Secretary to satisfy petitioners' claim would have to be met by the Treasury. Moreover, 12 U.S.C. 1723a provides that no injunction or other similar process shall be issued against the property of GNMA.

The district court agreed and dismissed the complaint (Pet. Supp. App. 1s-8s). The court found that petitioners' suit was in reality an action against the United States and as such was barred by the doctrine of sovereign immunity. The

court of appeals affirmed by judgment order, holding that the complaint failed to state a claim upon which relief could be granted (Pet. App. 1a).

ARGUMENT

The court of appeals correctly affirmed the judgment dismissing petitioners' complaint. The decision below does not conflict with the decisions of this Court or of any other court of appeals. Accordingly, no further review is warranted.

1. Petitioners first contend (Pet. 12-22) that their claim is not barred by the doctrine of sovereign immunity. They state, however, that the court of appeals "never reached" the sovereign immunity issue (*id.* at 10) — a concession that undermines their argument that the decision below conflicts with other decisions on this issue. In any event, petitioners' argument is wholly without merit.

In *FHA* v. *Burr*, 309 U.S. 242, 250 (1940), this Court noted that:

> only those funds which have been paid over to the Federal Housing Administration in accordance with § 1 and which are in its possession, severed from Treasury funds and Treasury control, are subject to execution. * * * To conclude otherwise would be to allow proceedings against the United States where it had not waived its immunity.

It is settled law that a "sue and be sued" provision does not constitute a waiver of sovereign immunity where the suit is in reality one against the United States; such provisions allow an action against a government agency only where the judgment could be met from a separate fund in the independent control of the agency. If the judgment would invade the public treasury, the action is barred by sovereign

immunity. See *Dugan* v. *Rank*, 372 U.S. 609, 620-621 (1963); *Land* v. *Dollar*, 330 U.S. 731 (1947); *FHA* v. *Burr*, *supra*, 309 U.S. at 250.

In the present case, GNMA and the Secretary possess no separate fund from which petitioners' constitutional tort claim could be met. All money in GNMA's possession is earmarked for implementation of its statutory duties and programs, none of which provides for damages or compensation for an allegedly tortious sale of mortgages. Monies allocated for the performance of GNMA's functions therefore cannot be diverted to the payment of petitioners' claim and any such sum would have to be obtained from the Treasury.[2]

Contrary to petitioners' contention (Pet. 13-20), the courts of appeals are not in conflict on the question whether the "sue and be sued" provisions of 12 U.S.C. 1702 and 1723a constitute a waiver of sovereign immunity. All the cited decisions are based on the same principle of law: immunity is mandated unless there is a separate independent fund that provides for the financial relief sought. The decisions differ only on the factual question whether the potential judgment in each particular case could or could not be satisfied from an independent fund, distinct and separate from the Treasury.

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[2]Any surplus money that might accrue to GNMA from the exercise of its statutory functions must be transferred to the Treasury. 12 U.S.C. 1722. Likewise, the Treasury would have to assume any burden imposed on GNMA by the courts that had not been provided for in its annual budget.

Nor could GNMA pay to petitioners moneys allegedly held in an "excess rental service fund" created under Section 236(g) of the National Housing Act, 12 U.S.C. 1715z-1(g). As the Senate Committee on Banking, Housing and Urban Affairs stated: "The reserve [fund] is required under Section 236(g) of the Act to be used for additional operating assistance payments under the terms specified in Section 236(f)(3)." S. Rep. No. 94-749, 94th Cong., 2d Sess. 10 (1976).

In *Lomas & Nettleton Co.* v. *Pierce*, 636 F.2d 971 (5th Cir. 1981), as in this case, an action for damages was filed against GNMA and the Secretary of HUD. Plaintiffs alleged a breach of an agreement to sell mortgages acquired by GNMA. The Fifth Circuit held that the "sue and be sued" provisions of 12 U.S.C. 1702 did not remove the sovereign immunity bar to suit.The court noted that "the crux of the matter is whether the judgment sought would have to be satisfied from the United States Treasury" (636 F.2d at 973; footnote omitted). In *Lomas*, there was no separate fund in the control and possession of the Secretary of HUD or GNMA from which an award of compensatory damages could be met. Accord, *Southern Sog, Inc.* v. *Roland*, 644 F.2d 376, 379 (5th Cir. 1981).

The Ninth Circuit reached a similar conclusion in *Marcus Garvey Square, Inc.* v. *Winston Burnett Construction Co.*, 595 F.2d 1126 (1979). In that case, the owner of a housing project sought damages from the general contractor, who then cross-claimed against the Secretary of HUD and other federal agencies connected with the housing project. The court of appeals employed the practical test whether any judgment would have to be satisfied from the Treasury. The court found that the claims against the federal officials were in reality a suit against the United States. As such they were barred by the doctrine of sovereign immunity. See also *Armor Elevator Co.* v. *Phoenix Urban Corp.*, 655 F.2d 19, 22 (1st Cir. 1981) (damages action for alleged breach of regulatory duties brought against the Secretary of HUD by a subcontractor on HUD-insured housing project is not within 12 U.S.C. 1702); *United States* v. *Adams*, 634 F.2d 1261, 1265 (10th Cir. 1980) (12 U.S.C. 1702 does not encompass a contract damages suit); *DSI Corp.* v. *Secretary of Housing & Urban Development*, 594 F.2d 177 (9th Cir. 1979) (finding no waiver of sovereign immunity under 12 U.S.C. 1702 and holding that district court lacked subject matter jurisdiction).

Petitioners rely (Pet. 15-16) on the Second Circuit's decision in *S.S. Silberblatt* v. *East Harlem Pilot Block*, 608 F.2d 28 (1979), to support the contention that the courts have disagreed over the interpretation of 12 U.S.C. 1702 and 1723a. In *Silberblatt*, a general contractor on a housing project sought payment from the Secretary of HUD for work performed. The court of appeals found that any judgment against the Secretary could be satisfied out of funds appropriated under the National Housing Act. Because those funds were in the independent control of the Secretary and subject to his discretion, the court concluded that the claim was not barred by the doctrine of sovereign immunity.

Thus, while *Silberblatt* turned on facts distinguishable from the present case, its holding was based on the same principle enunciated in the cases on which we rely: "[f]or a claim to be against the Secretary, and therefore within the scope of the 'sue and be sued' clause, as opposed to a suit against the United States, any judgment for plaintiff must be out of funds in the control of the Secretary as distinguished from general Treasury funds" (608 F.2d at 36).[3]

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[3]Nor were the two district court decisions relied upon by petitioners (Pet. 16-20) based on any different principle.

In *Johnson* v. *Secretary of/and U.S. Dep't of Housing & Urban Development*, 544 F. Supp. 925, 935 (E.D. La. 1981), the court found that an action against the Secretary of HUD could be brought, since any judgment in that particular suit could be met out of the Special Risk Insurance Fund, which was "a separate fund in the control and possession of the Secretary."

In *Capitol Indemnity Corp.* v. *Freedom House Development Corp.*, 487 F. Supp. 839 (D. Mass. 1980), the court found that sovereign immunity did not apply because the plaintiff could identify a distinct source of HUD funds in the control of the Secretary out of which a judgment could be satisfied. The court noted that questions of availability and independent control of such funds were primarily matters of fact.

2. Petitioners' second argument (Pet. 23-27), that their demand to participate in the mortgage auction is a constitutionally protected property interest, was not addressed by either of the lower courts. It is therefore not a proper subject for review by this Court. In any event, it is clear that petitioners do not possess a property interest that would be destroyed by GNMA's offer to sell tandem program mortgages only to FHA-approved mortgagees.

In *Board of Regents* v. *Roth*, 408 U.S. 564, 576-577 (1972), this Court held that

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. * * * To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Here, petitioners have no statutory right to bid for tandem program mortgages. This is not a case in which petitioners have in the past been allowed to participate in these mortgage auctions and have now been deprived of that benefit. Moreover, respondents have made no contract with petitioners to allow them to bid for the mortgages. Nor did GNMA hold out to them any implied promise that they would be allowed to bid. On the contrary, GNMA procedures makes it very clear that mortgages will be auctioned only to FHA-approved mortgagees. The sale of mortgages only to FHA-approved mortgagees is based on policy

considerations[4] and not unlawful discrimination of any sort. In these circumstances, petitioners have no legitimate property right or claim that has been taken from them without due process.

Nor do the cases upon which petitioners rely (Pet. 23-25) advance their cause. *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), was a case in which the plaintiff already was receiving statutory benefits and therefore had a property interest in not having those benefits terminated. *Smith* v. *Organization of Foster Families*, 431 U.S. 816 (1977), dealt with the removal of children from foster parents with whom close ties of family relationship had already been created. *Buchanan* v. *Warley*, 245 U.S. 60 (1917), was a case of clearly unlawful discrimination, in which a city ordinance prohibited whites from selling their houses to blacks and blacks from selling their houses to whites. It was in this context that the Court noted (*id.* at 74) that property includes "the right to acquire, use and dispose of it." This statement, however, does not support petitioners' claim to a constitutionally protected property interest in the tandem program mortgage sales.

3. There is an additional reason why this petition should be denied. The predicate for petitioners' claims is that they will be denied the opportunity to participate in GNMA's auction of their mortgage. According to HUD records,

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[4]Were GNMA to sell to a non-approved mortgagee, the FHA would have the right to terminate its insurance on the mortgage. Cancellation of FHA insurance would terminate the FHA regulatory agreement applicable to the property and enable the owners to change the nature of the housing. GNMA supports the FHA policy that requires property to remain subject to the FHA regulatory agreement throughout the term of the mortgage, thus ensuring that the property will remain available as moderate income housing. Moreover, GNMA could be deprived of its status as an FHA-approved mortgagee were it to transfer an FHA-insured mortgage to a party who was not so approved.

however, petitioners defaulted on the mortgage on September 30, 1982. On October 7, 1982, GNMA elected to assign the mortgage to the Secretary of HUD for the collection of insurance claim benefits. The mortgage was subsequently assigned to the Secretary of HUD and has been recommended for foreclosure.

While HUD also sells such mortgages at auction, the restrictions on GNMA auctions do not apply. Thus, should HUD offer for sale the mortgage at issue here, petitioners would not be barred from participation.[5] Their claim of preclusion from the GNMA auction is therefore moot.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]Office of Housing, U.S. Dep't of Housing & Urban Development, *Special Auction -- HUD Project Mortgage Auction July 27, 1983*, at 2. As mortgagors of the property, petitioners would be eligible to bid if the mortgage were brought current. HUD auctions only current mortgages.

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